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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~515~~ 52

MYRON WIENER, *Petitioner*

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Claims

REPLY BRIEF FOR PETITIONER

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Counsel for Petitioner

IN THE

Supreme Court of the United States

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No. 615

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REPLY BRIEF FOR PETITIONER

I

The respondent, in its brief in opposition, directed its attention primarily to a discussion of the merits of the case, and has nowhere addressed itself to the importance and substantiality of the Federal question presented. This ingenuous approach should not be

permitted to obscure the fact that (1) the respondent has nowhere disclaimed, denied or answered the petitioner's contention that the decision below applies to and affects such important agencies as Securities and Exchange Commission, Federal Power Commission, Federal Communications Commission and U. S. Tariff Commission[1]; (2) that the broad sweep and scope of the decision below impinges on the doctrine of separation of powers; and (3) that the decision below goes further than any decision of this Court in expressing the extent of Executive control over quasi-judicial and quasi-legislative functions through the exercise of the power of removal.

II

The respondent would have us accept this Court's decision in *Myers* v. *United States*, 272 U.S. 52, as holding that the President "may in his discretion remove any executive official whose nomination and appointment are made by him" (Br. in Opp. p. 4) and that *Humphrey's Ex'r.* v. *United States*, 295 U. S. 602 reemphasized "the well-established principle that absent Congressional limitation, the removal power of the President is absolute." (Br. in Opp. p. 7) But this Court did not go that far.

In its decision in *Humphrey* this Court made it plain that "The *Myers* decision affirming the power of

[1] While not precisely in the same category as these important boards and commissions, the U. S. District Judges at Hawaii and Puerto Rico are similarly affected by the decision below. The judges of these courts are, as distinguished from most district court judges, appointed and hold office not "during good behavior" but for a term of years with no causes for removal enumerated. 28 U.S.C. 134(a).

the President alone to make the removal is confined to purely executive officers." (id., p. 631) The officers involved in this case were not *executive* officers; they were, as the Court below found after careful consideration, *quasi-judicial and quasi-legislative officers.*[2] In *Humphrey's Ex'r* v. *United States, supra*, this Court held only that "the unrestricted power of the President to remove purely executive officers * * * does not extend to an office such as that here involved * * * " [i.e., Federal Trade Commissioner] 295 U. S. at 632. Nor can it be said the issues in this case are governed by the decision in *Humphrey;* there, the statute enumerated the causes for which the President could remove an officer, but in the instant case the statute was silent with regard to removal.

Does it therefore follow that when the Congress fixes a term but does not enumerate *any* causes for which the President can remove; that the petitioner as well as members of other boards, commissions, and certain District judges (similarly situated), not "charged with the enforcement of policy, except the policy of law;" whose duties "are neither political nor

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[2] The Court of Claims devoted one-third of its opinion to an exhaustive and detailed analysis of the functions and responsibilities of the War Claims Commission and concluded that the Commission "was acting in a quasi-judicial capacity; or, perhaps as an agent of Congress. * * * The powers conferred upon it * * * were wholly judicial, or, perhaps, legislative in character. * * * Other duties were also put upon the Commission * * * not of an executive but of a legislative nature. * * * There can be no doubt that in discharging this function the Commission acted as an agent of the Congress. * * *. Nowhere in the Act is there cast upon the Commission the discharge of any executive function. All of its functions were of a nature either judicial or legislative" (App. p. 3a, et seq.).

executive but predominantly quasi-judicial and quasi-legislative", 295 U. S. at 624, are no longer entirely free from the "remotest influence direct or indirect," of the President? This issue is one which involves a fundamental question affecting the separation of powers, lying in "a field of doubt,"[3] which has not heretofore been decided by this Court.

III

The respondent contends the decision below involves simply the determination of Congressional intent, requiring only the application of a rule of statutory construction: that "a statute would not be interpreted as attempting to limit the power of removal in the absence of clear and express language to that end." (Br. in Opp., p. 6) It relies for support on *Parsons* v. *United States*, 167 U. S. 234 and *Shurtleff* v. *United States*, (*supra*) as support for this proposition. Both of these cases, however, involved executive officers where it was necessary for this Court to ascertain whether the Congress intended to restrict their removal in order to determine the validity of a statute. When the Government made the same argument and urged the same authorities upon this Court in the *Humphrey* case, this Court said the rule in *Shurtleff* was *exceptional* and the occasion for its application in prior cases *plainly and wholly different*

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[3] To the extent that, between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise. (295 U.S. at 632).

from a situation involving quasi-judicial and quasi-legislative officers. This Court then held it could ascertain whether Congress intended to restrict removal from either the language of the statute, consideration of the character of the commission, and its legislative history.[4]

The issue in the instant case is not whether the silence of Congress with regard to causes for removal, deprives the President of power to remove, but rather whether the absence in the Act of any enumeration of causes for removal must be construed as either a grant or acknowledgment of the existence of the power to remove quasi-judicial or quasi-legislative officers without cause before the expiration of their term. Where does the President derive his powers over officers who are not within the orbit of his executive functions or responsibilities?[5] The answer is not to be found in a rule of statutory construction applicable to *executive officers*, but in an analysis of the Constitutional concepts of the interrelation of judicial, legislative

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[4] This proceeding is neither the time nor the place to argue the merits. However, the Government at page 8 of its brief urges that the debates and hearings before the Congress do not contain "• • • the slightest expression of any purpose • • • to limit in any way the executive power of removal." It is necessary therefore to suggest that it overlooks, at least one prior draft of this legislation (H.R. 4404, 80th Cong., 1st Sess.) which gave the President the authority to curtail the life of the Commission, and thus, the term of its members; which grant of authority was significantly excluded from the law as finally adopted. cf. *Penn R. Co.* v. *International Coal Co.*, 230 U.S. 184, 198.

[5] Presidential power if any "must stem either from an Act of Congress or from the Constitution itself." *Youngstown Sheet and Tube* v. *Sawyer*, 343 U.S. 579, 585.

and executive authority, using as a frame of reference the doctrine of separation of powers in the Constitution.[6]

CONCLUSION

The decision below vitally affects the status and independence of important existing boards and commissions and a number of District Court Judges; it impinges substantially on the doctrine of separability; extends the doctrine of the *Humphrey* case to areas this Court left for future determination; and therefore involves a substantial Federal question which should be considered and determined by this Court.

For the foregoing reasons and those contained in the Petition, the petitioner respectfully prays that the Writ of Certiorari to the United States Court of Claims be granted.

Respectfully submitted,

I. H. WACHTEL
Counsel for Petitioner

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[6] The fundamental necessity of maintaining each of the three general departments of government entirely free from the control of coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution, and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. (295 U.S. at p. 629).